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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/668,830	09/23/2003	James L. Freeby	2032.2.1	4985
36491	7590	04/07/2006		
KUNZLER & ASSOCIATES 8 EAST BROADWAY SALT LAKE CITY, UT 84111			EXAMINER KATCHEVES, BASIL S	
			ART UNIT	PAPER NUMBER
			3635	
DATE MAILED: 04/07/2006				

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/668,830
Filing Date: September 23, 2003
Appellant(s): FREEBY ET AL.

MAILED

APR 07 2006

GROUP 3600

David McKenzie
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 9/16/05 appealing from the Office action mailed 5/24/05.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

No evidence is relied upon by the examiner in the rejection of the claims under appeal.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

Claims 1-10, 12-14, 16, 17 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 3,946,569 to Stuber in view of U.S. Patent No. 237,172 to Dentler.

Regarding claim 1 Stuber discloses a barrier (fig. 7: 24) comprised of a bentonite material surrounding a pole (fig. 7: 10). In addition, Stuber does not disclose the bentonite as being exposed to the above ground environment. Dentler discloses a pole protector ringed around a pole and located at ground level (fig. 2: D). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Stuber by placing the protective bentonite rings at the ground surface, as

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disclosed by Dentler to help firmly anchor the post to the ground (Dentler, lines 52-53).

Applicant should note that although the prior art does not specifically disclose fire prevention, the prior art is the structural equivalent of the basic claim structure and therefore, has the inherent capability of functioning as a fire stop as in the applicant's claims.

Regarding claim 2, Stuber discloses a retaining device (fig. 7: 20) for retaining the material.

Regarding claim 3, Stuber discloses a pole (fig. 7: 10).

Regarding claims 4 and 16, Stuber discloses the material as surrounding the pole (fig. 7).

Regarding claims 5-7, Stuber discloses the basic claim structure of the instant application but does not disclose specific dimensions between the perimeter and the pole. Applicant fails to show criticality for specifically claimed dimensions, therefore it would have been an obvious design choice to use the dimensions such as specified in these claims.

Regarding claims 8-10, Stuber discloses the basic claim structure of the instant application but does not disclose specific dimensions of the material depth. Applicant fails to show criticality for specifically claimed dimensions, therefore it would have been an obvious design choice to use the dimensions such as specified in these claims.

Regarding claims 12 and 14, Stuber discloses a depression (fig. 8: 16) at the boundary of the material.

Regarding claims 13 Stuber discloses a barrier (fig. 7: 24) comprised of a bentonite material surrounding a pole (fig. 7: 10). Stuber does not disclose the bentonite as being exposed to the above ground environment. Dentler discloses a pole protector ringed around a pole and located at ground level (fig. 2: D). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Stuber by placing the protective bentonite rings at the ground surface, as disclosed by Dentler to help firmly anchor the post to the ground (Dentler, lines 52-53). Applicant should note that although the prior art does not specifically disclose fire prevention, the prior art is the structural equivalent of the basic claim structure and therefore, has the inherent capability of functioning as a fire stop and as a vegetation growth barrier as in the applicant's claims. Also, the combined prior art discloses the basic claim structure of the instant application but does not disclose specific percentages of bentonite as in these claims. Applicant fails to show criticality for specifically claimed dimensions, therefore it would have been an obvious design choice to use the dimensions such as specified in these claims depending upon a specific use and need.

Regarding claim 17, Stuber does not specifically disclose the bentonite as sloping upwards toward the pole. However, Stuber discloses mixing the bentonite with concrete (column 3, lines 37-42). A centrally sloping slurry, toward the central pole, would be inherent, as gravity acts upon a slurry to provide an upward sloping toward the slurry's center as it is poured.

Regarding claim 19, Stuber does not disclose adding additional bentonite to the bentonite based mixture. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to add additional material to the mixture in response to situations where the mixture is being overtaken, eroded or generally lacking. In construction situations, it is common to replace materials such as gravel, soil, grass, seed, concrete, etc., as the effects of weather, traffic, etc., require the need for maintaining materials to their proper amount.

Claims 11, 15 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 3,946,569 to Stuber in view of U.S. Patent No. 237,172 to Dentler further in view of U.S. Patent No. 5,048,605 to Toon et al.

Regarding claims 11 and 15, Stuber discloses the bentonite material in an annular ring around the pole (fig. 7: 12) wrapped by a rubber sheet, not a plastic sheet. Toon discloses a pole surrounded by bentonite (column 1, line 29) having a plastic sheet wrapped around (column 5, lines 62-66). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Stuber by using a plastic sheet, as disclosed by Toon, in order to increase the barrier protection while reducing costs.

Regarding claim 20, Stuber discloses bentonite material in an annular ring around a pole (fig. 7: 12) wrapped by a rubber sheet, not a plastic sheet. Toon discloses a pole surrounded by bentonite (column 1, line 29) having a plastic sheet wrapped around (column 5, lines 62-66). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Stuber by using a

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plastic sheet, as disclosed by Toon, in order to increase the barrier protection while reducing costs. Also, Stuber in view of Toon discloses the basic claim structure of the instant application but does not disclose specific dimensions of the bentonite material as claimed in the application. Applicant fails to show criticality for specifically claimed dimensions of bentonite and soil, therefore it would have been an obvious design choice to use the dimensions such as specified in these claims for use in specific circumstances. Also, Stuber does not disclose the bentonite as being exposed to the above ground environment. Dentler discloses a pole protector ringed around a pole and located at ground level (fig. 2: D). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Stuber by placing the protective bentonite rings at the ground surface, as disclosed by Dentler to help firmly anchor the post to the ground (Dentler, lines 52-53). Applicant should note that although the prior art does not specifically disclose fire prevention, the prior art is the structural equivalent of the basic claim structure and therefore, has the inherent capability of functioning as a fire stop as in the applicant's claims.

Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 3,946,569 to Stuber in view of U.S. Patent No. 237,172 to Dentler further in view of U.S. Patent No. 6,399,544 to Fairchild et al.

Regarding claim 18, Stuber does not specifically disclose pumping of the material. Fairchild discloses the pumping of a bentonite material (abstract, line 1).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Stuber by using a pumpable bentonite material, as disclosed by Fairchild, in order to speed installation time.

(10) Response to Argument

The applicant argues the combination of U.S. Patent No. 3,946,569 to Stuber (Stuber) in view of U.S. Patent No. 237,172 to Dentler (Dentler). The applicant argues that the prior art does not teach a region configured to prevent plant growth. However, the combination teaches an area around a pole which is not capable of sustaining plant growth and the spread of fires. Both metal (Dentler) and Bituminous materials (Stuber) prevent the spread of plant life and fires. The prior art does not recognize the same problems of the applicant, but the prior art solves the same problems of the instant application. The applicant argues that Dentlers block (D) does not act in such a manner because it is made of tar coated wood. However, the applicant should also note that Dentler discloses the use of metal, as well as tar coated wood (line 58). It should also be noted that Dentler is combined not because of the material it is made from, but because of the teaching to place the ringed support at ground level (lines 50-55). Applicant argues that Stuber discloses bracelets of burlap around a pole. However, these rings are made from bentonite, meeting the claim limitation of the applicant. The applicant argues that seeds may take root and fire may burn the burlap of Stuber. However, this does not negate the bentonite material placed around the pole. The applicant argues that the prior art does not teach or suggest protecting an object from

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fire by preventing plant growth. However, the applicant should note that the method, as claimed, is met by the combination of the prior art cited. Applicant argues the combination because it is not obvious to place the bracelets of Stuber at the surface as disclosed by Dentler. However, the bracelets of Stuber are used to stabilize the pole, as are the bracelets of Dentler. Dentler, however, teaches that placing the bracelets at the surface helps to better secure them, as noted above. Applicant argues that the burlap of Stuber will not be sufficiently wet so as to dissolve if placed at the surface. However, burlap will dissolve when exposed to the elements, as burlap is biodegradable. Applicant argues the percentage of bentonite claimed is not met by the prior art. Applicant should note that a general, broad quantity shows a lack of criticality, therefore making it an obvious choice. The applicant argues the use of the Fairchild reference because it does not teach a fire barrier. Again, the applicant should note that the structure claimed is met by the combination of art for claim, and therefore may perform in the same manner as that of the instant application.

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(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Basil Katcheves

Conferees:

Carl Friedman 

Pete Cuomo 


Carl D. Friedman
Supervisory Patent Examiner
Group 3600